HONG LEONG BANK BHD v. MENTERI SUMBER MANUSIA, MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
LIM YEE LAN JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-01-403-09-2012]
15 FEBRUARY 2016

ADMINISTRATIVE LAW: *Exercise of judicial functions – Judicial review – Application to quash decision of Minister – Whether Minister's decision making process tainted – Whether all relevant materials available for scrutiny before court – Absence of important report referred to by Minister in making impugned decision – Whether resulted in court's inability to meticulously examine materials – Failure of Minister and/or Director General of Industrial Relations to produce report on which decision was founded on – Whether tantamount to fatal error justifying order of certiorari – Industrial Relations Act 1967, s. 9(1D)*

Hong Leong Bank Berhad ('bank') rolled out two nationwide exercises promoting eligible non-executive employees who were either members of the National Union of Bank Employees ('NUBE') or the Association of Bank Officers, Peninsular Malaysia ('ABOM'). Eligible non-executive staff of the bank was invited to apply for promotion to the E4 grade. The promoted staff who were originally performing clerical/teller functions were now required to perform executive functions as operations and customer service executives. Subsequently, however, NUBE demanded for the immediate cessation of the promotion exercise on the basis that the same was purportedly a union-busting exercise. The bank rejected the aforesaid demand on the ground that its operational needs in the challenging business environment necessitated the engagement of employees who performed higher and more diverse duties and responsibilities as opposed to purely clerical/teller functions. The bank contended that NUBE's demand was contrary to the bank's prerogative to promote their staffs, who were entitled to either accept or decline the promotion. NUBE then initiated both a complaint of non-compliance under s. 56 of the Industrial Relations Act 1967 ('the Act') against the bank in the Industrial Court regarding the E4 grade issue. The complaint under s. 56 of the Act was struck off by the Industrial Court pursuant to a preliminary objection by the bank that the dispute involved was a trade dispute and should be continued under s. 26 and not under s. 56 of the Act. As part of the efforts to resolve the aforesaid trade dispute, the Director General of Industrial Relations ('DGIR') through the Industrial Relations Department decided to conduct an investigation on the scope of the E4 grade. Twenty three E4 grade staff were interviewed. The

bank then received a letter from the Industrial Relations Department advising that the Minister of Human Resources ('Minister') had *vide* a letter dated 27 July 2011 made a decision under s. 9(1D) of the Act that the 'Executive E4 grade Staff employed by the bank are employees that are not employed in the managerial, executive, confidential or security capacity.' The bank thus in a judicial review proceedings sought an order to quash the said decision of the Minister. The bank challenged the Minister's decision on the ground that it was made in error of law, without jurisdiction and tainted with procedural unfairness and there was a breach of natural justice on the part of the Minister in arriving at his decision. The High Court Judge dismissed the bank's application and hence, this appeal.

Held (allowing appeal; setting aside decision of High Court)
Per Lim Yee Lan JCA delivering the judgment of the court:

(1) In order for the High Court Judge acting in her capacity as a judicial review judge to be able to come to the conclusions she did, it was imperative that she must have had all relevant materials before her for her scrutiny before she could decide whether the Minister's decision-making process was tainted or otherwise. In the bank's affidavit in support of its application, substantial allegations were made against the DGIR and the Minister in the exercise of their functions and powers under s. 9 of the Act. Although the affidavit in reply of the Minister was entitled 'Afidavit Jawapan Responden Pertama dan Kedua', it was the affidavit of the Minister alone. The DGIR did not file a separate affidavit to reply to the affidavit in support of the bank. (paras 31 & 32)

(2) Once the decision making process of the Minister was challenged in a judicial review application, it was incumbent on the Minister to justify the manner by which he came to his decision by exhibiting the relevant reports and documents furnished to him by the DGIR. It was not sufficient for the Minister to make an averment that he had relied on the investigation of the DGIR. In the absence of the reports and documents, the statement of the Minister that he took into account the report of the DGIR was a bare averment. (para 36)

(3) The High Court Judge had found that based on the materials before her, she was satisfied that there were sufficient facts placed before the Minister to enable him to come to the decision he did. However, the High Court Judge could not have come to such a conclusion when she did not have before her the report of the DGIR to enable her to objectively determine whether the Minister's decision making was flawed or otherwise. The High Court Judge erred in failing to consider that the absence of the report of the DGIR referred to by the Minister

in his joint affidavit in reply had resulted in her inability to meticulously examine all the materials that were said to have been before the Minister when he made his impugned decision. (paras 37-39)

(4) The DGIR did not affirm a separate affidavit exhibiting his report based on his investigation which he had carried out which was then submitted to the Minister. Consequently, there was no material before the High Court to enable it to confirm that the Minister had acted reasonably in coming to his decision. The failure of the Minister to enclose the DGIR's report which he had relied on and/or the failure of the DGIR to depose a separate affidavit enclosing his report tantamount to a fatal error justifying an order of *certiorari*. In failing to take into account the obligation on the part of the Minister and/or DGIR to produce the report upon which the decision was founded on, the High Court similarly committed an error of law. (paras 41-44)

Bahasa Malaysia *Headnotes*

Hong Leong Bank Berhad ('bank') melaksanakan dua latihan di seluruh negara bagi menaikkan pangkat pekerja-pekerja bukan eksekutif yang merupakan sama ada ahli-ahli Kesatuan Kebangsaan Pekerja-pekerja Bank ('NUBE') atau Persatuan Pegawai-pegawai Bank Semenanjung Malaysia (ÁBOM'). Kakitangan bukan eksekutif bank dijemput memohon kenaikan pangkat ke gred E4. Kakitangan yang dinaik pangkat yang sebelum ini melakukan fungsi-fungsi juruwang sekarang diperlukan menjalankan fungsi-fungsi sebagai eksekutif-eksekutif operasi dan perkhidmatan pelanggan. Walau bagaimanapun NUBE kemudian menuntut penghentian segera pelaksanaan kenaikan pangkat tersebut atas dasar bahawa ia satu latihan yang tidak memanfaatkan kesatuan. Bank menolak tuntutan tersebut atas alasan keperluan operasi dalam urusan perniagaan yang makin mencabar memerlukan penglibatan pekerja yang boleh menjalankan tanggungjawab yang lebih tinggi dan berbeza berbanding dengan fungsi-fungsi perkeranian dan juruwang semata-mata. Bank menghujahkan bahawa tuntutan NUBE bertentangan dengan hak bank untuk menaikkan pangkat kakitangan mereka, yang berhak untuk menerima atau menolak kenaikan pangkat itu. NUBE memulakan aduan berkenaan ketakpatuhan di bawah s. 56 Akta Perhubungan Perusahaan 1967 ('Akta') terhadap bank dalam Mahkamah Perusahaan berhubungan dengan isu gred E4. Aduan di bawah s. 56 Akta ditolak oleh Mahkamah Perusahaan menurut bantahan awalan oleh bank bahawa pertikaian melibatkan pertikaian perdagangan dan harus diteruskan di bawah s. 26 dan bukan s. 56 Akta. Sebagai sebahagian daripada usaha untuk menyelesaikan pertikaian perdagangan, Ketua Pengarah Perhubungan Perusahaan ('DGIR') melalui Jabatan Perhubungan Perusahaan memutuskan untuk menjalankan penyiasatan berkenaan skop gred E4. Dua puluh tiga

kakitangan gred E4 ditemu bual. Bank kemudian menerima surat daripada Jabatan Perhubungan Perusahaan memaklumkan Menteri Sumber Manusia ('Menteri') telah, melalui surat bertarikh 27 Julai 2011, membuat keputusan di bawah s. 9(1D) Akta bahawa 'Kakitangan gred E4 yang bekerja dengan bank adalah pekerja-pekerja yang tidak diambil kerja dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan.' Bank seterusnya, melalui prosiding semakan kehakiman, menuntut perintah membatalkan keputusan Menteri tersebut. Bank membantah keputusan Menteri atas alasan beliat terkhilaf dari segi undang-undang, tanpa bidang kuasa dan dicemari dengan ketidakadilan prosedur serta terdapat pelanggaran keadilan asasi oleh Menteri dalam mencapai keputusannya. Hakim Mahkamah Tinggi menolak permohonan bank dan oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)
Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi, dalam kapasitinya sebagai hakim semakan kehakiman, dalam mencapai kesimpulan yang dibuatnya, harus meneliti segala material relevan sebelum boleh memutuskan sama ada keputusan Menteri dicemari atau tidak. Dalam afidavit sokongan bank, dakwaan besar telah dibuat terhadap DGIR dan Menteri dalam pelaksanaan fungsi-fungsi dan kuasa-kuasa di bawah s. 9 Akta. Walaupun afidavit jawapan Menteri bertajuk 'Afidavit Jawapan Responden Pertama dan Kedua', ini hanya afidavit Menteri sahaja. DGIR tidak memfailkan afidavit jawapan berasingan kepada afidavit sokongan bank.

(2) Apabila proses membuat keputusan Menteri dibantah oleh permohonan semakan kehakiman, adalah penting untuk Menteri menjustifikasikan cara beliau mencapai keputusan itu dengan menunjukkan laporan dan dokumen relevan yang disediakan kepadanya oleh DGIR. Tidak memadai sekiranya Menteri membuat penegasan bahawa beliau telah bergantung pada penyiasatan DGIR. Tanpa laporan dan dokumen tertentu, pernyataan Menteri bahawa beliau telah mengambil kira laporan DGIR hanya penegasan kosong.

(3) Hakim Mahkamah Tinggi mendapati berdasarkan material-material di hadapannya, beliau berpuas hati terdapat fakta-fakta mencukupi untuk Menteri mencapai keputusan yang telah dibuat olehnya. Walau bagaimanapun, Hakim Mahkamah Tinggi tidak mungkin mencapai keputusan sebegitu apabila beliau tidak menerima laporan DGIR untuk membolehkannya menentukan secara objektif sama ada cara Menteri membuat keputusan adalah cacat atau sebaliknya. Hakim Mahkamah Tinggi terkhilaf dalam kegagalannya mengambil kira ketiadaaan laporan

DGIR yang dirujuk oleh Menteri dalam afidavit jawapannya kerana mengakibatkan beliau gagal memeriksa secara teliti segala material yang dikatakan dirujuk oleh Menteri apabila membuat keputusan yang dipertikaikan itu.

(4) DGIR tidak mengesahkan afidavit berasingan yang menyertakan laporannya berdasarkan penyiasatan yang dibuat olehnya yang diserahkan kepada Menteri. Akibatnya, tiada material di hadapan Mahkamah Tinggi bagi membolehkannya mengesahkan Menteri telah bertindak secara munasabah dalam mencapai keputusan beliau. Kegagalan Menteri menyertakan laporan DGIR yang dirujuk olehnya dan/atau kegagalan DGIR mendepos afidavit berasingan dalam laporannya berjumlah kepada satu kesalahan fatal yang mewajarkan perintah *certiorari*. Dalam kegagalannya mengambil kira kewajipan dari pihak Menteri dan/atau DGIR untuk mengemukakan laporan yang dirujuk apabila membuat keputusan, Mahkamah Tinggi telah melakukan satu kesilapan undang-undang.

Case(s) referred to:

Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia Malaysia & Ors [2007] 2 CLJ 97 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Kelab Lumba Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***

Kennesion Brothers Sdn Bhd v. Construction Workers Union [1989] 2 CLJ 569; [1989] 1 CLJ (Rep) 54 SC ***(refd)***

Menara Pan Global Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Minister of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

National Union of Hotel, Bar, and Restaurant Workers v. Minister of Labour and Manpower [1980] 1 LNS 50 FC ***(refd)***

Petroliam Nasional Berhad v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

YB Menteri Sumber Manusia v. Association of Bank Officers Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 9(1A), (1B), (1D), (3)(c), (4A), (4B)(b), 26, 56

For the appellant - Sivabalah Nadarajah & Reena Enbasegaram; M/s Shearn Delamore & Co

For the 1st & 2nd respondents - Shahroni Sanusi; SFC

For the 3rd respondent - Alex De Silva; M/s Bodipalar Ponnudurai De Silva

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Yee Lan JCA:

Introduction

[1] The appellant (Hong Leong Bank) had earlier in a judicial review proceedings sought an order to quash the decision of the first respondent (Minister of Human Resources) *vide* a letter dated 21 July 2011 made pursuant to s. 9 (ID) of the Industrial Relations Act 1967 (the Act) in which the first respondent had declared that the appellant's employees in the new Executive E4 grade "are employees that are not employed in the managerial, executive, confidential or security capacity".

[2] The High Court after hearing the submission of the parties and perused the cause papers dismissed the appellant's application with costs to the respondents.

[3] Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal. Hence, this appeal before us.

[4] We had, on 7 August 2014 after hearing submissions from the parties and perused the appeal records, allowed the appeal. The reasons for our decision are as set out in the following paragraphs of this judgment.

[5] In this judgment, the parties will be referred to as they were in the High Court.

Background Facts

[6] Sometime in 2005 and 2006, Hong Leong Bank ("the bank") rolled out two nationwide exercises promoting eligible non-executive employees who were either members of the National Union of Bank Employees ("NUBE") or the Association of Bank Officers, Peninsular Malaysia ("ABOM").

[7] Eligible non-executive staff of the bank was invited to apply for promotion to the E4 grade.

[8] The promoted staff who were originally performing clerical/teller functions were now required to perform executive functions as Operations and Customer Service Executives. The promotion exercise was voluntary in nature and the eligible staff were required to fulfil various criteria (including undergoing tests and interviews), before being considered for promotion.

[9] Pursuant to rr. 2 and 3 of NUBE's constitution, NUBE's membership is open to all workmen employed in categories other than the Executive, Management, Confidential and Security capacities in commercial banks in Peninsular Malaysia.

[10] In June 2007, NUBE demanded for the immediate cessation of the promotion exercise on the basis that the same was purportedly a union-busting exercise.

[11] The bank rejected the aforesaid demand on the ground that its operational needs in the challenging business environment necessitated the engagement of employees who performed higher and more diverse duties and responsibilities as opposed to purely clerical/teller functions.

[12] The bank also explained that the aforesaid promotion exercise was to provide performing staff with an opportunity to assume higher responsibilities and advance their careers in the bank. It was also to provide the eligible staff with opportunities to fill up vacancies in the E4 grade category before the bank sourced for external candidates. The bank contended that NUBE's demand was contrary to the bank's prerogative to promote their staffs, who were entitled to either accept or decline the promotion.

[13] In May 2008, NUBE initiated both a complaint of non-compliance under s. 56 of the Act against the bank in the Industrial Court regarding the E4 grade issue as well as a complaint of a trade dispute under s. 18 of the Act.

[14] The complaint under s. 56 of the Act was struck off by the Industrial Court pursuant to a preliminary objection by the bank that the dispute involved is a trade dispute and should be continued under s. 26 and not under s. 56 of the Act.

[15] In April 2011, as part of the efforts to resolve the aforesaid trade dispute, the Director General of Industrial Relations ("DGIR") through the Industrial Relations Department decided to conduct an investigation on the scope of the E4 grade. Twenty three promoted E4 grade staff were interviewed, where questions were posed to them both verbally and in writing.

[16] On 5 August 2011, the bank received a letter dated 27 July 2011 from the Industrial Relations Department advising that the Minister had *vide* a letter dated 27 July 2011 made a decision under s. 9(1D) of the Act that the "Executive E4 grade Staff employed by the bank are employees that are not employed in the managerial, executive, confidential or security capacity".

[17] At the High Court, the bank challenged the Minister's decision on the ground that it was made in error of law, without jurisdiction and tainted with procedural unfairness and there was a breach of natural justice on the part of the Minister in arriving at his decision.

[18] In particular, the bank raised the following grounds in support of its application:

(a) The Minister erred in law in finding that the E4 grade employees were not employees who were employed in the managerial, executive, confidential or security capacity;

(b) The Minister erred in law in failing to refer the E4 grade dispute to the Director General of Trade Union ("DGTU") pursuant to s. 9(4B)(b) of the Act to ascertain whether NUBE was competent to represent the E4 grade employees; and

(c) The failure of the Minister to inform the Bank of the interview session conducted with 23 E4 grade executives by the Industrial Relations Department and the outcome of the investigations was a breach of natural justice.

High Court's Decision

[19] On 16 August 2012 the learned High Court Judge dismissed the bank's application, citing the following grounds for her decision.

(a) As provided under s. 9(6) of the Act, a decision of the Minister made under s. 9 (ID) is a final decision and cannot be questioned in any court. Despite its apparent finality, a decision can be reviewed if the applicant can demonstrate any error of law or jurisdictional error (see: *YB Menteri Sumber Manusia v. Association of Bank Officers Peninsular Malaysia* [1999] 2 CLJ 471; *National Union of Hotel, Bar, and Restaurant Workers v. Minister of Labour and Manpower* [1980] 1 LNS 50; *Minister of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9);

(b) In *Minister of Labour Malaysia v. Lie Seng Fatt*, the Supreme Court warned that a judicial review court must not act as if it is an appeal court and should resist the temptation to convert a judicial review application into an appeal;

(c) In the case of *Kelab Lumba Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517, the Federal court observed that if a decision is made in the absence of any explanation or sufficient reasons, the court is entitled to conclude that there was no good reason to offer, and such decision can be interfered with on ground of *Wednesbury* unreasonableness;

(d) Taking into account the principles of law governing a judicial review proceeding, the court is of the considered view that in this case there are no merits in the bank's application for the court to quash the aforesaid decision of the Minister;

(e) In regard to the first issue that the Minister erred in law in failing to appreciate that grade E4 employees are indeed in the executive capacity, the court finds that both the DGIR and the Minister had acted in accordance with the provisions of s. 9 of the Act and there was no procedural impropriety in this case;

(f) Section 9(1A) deals with a dispute on whether a "workman" is employed in a managerial, executive, confidential or security capacity which is referred to the DGIR by the Trade Unions;

(g) Under s. 9(IB), the DGIR may make enquiries and try to resolve the matter and failing such resolution, the Minister must be notified, and the Minister is empowered under s. 9(1D) to give his decision on the issue;

(h) In this case the DG had deposed that he had conducted enquiries and interviewed the relevant employees relevant (23 of them) to determine the scope of work of the E4 grade, in coming up with his recommendation to the Minister;

(i) There are sufficient authorities that stated that a judicial review court cannot substitute a finding of a tribunal with its own (see: *Menara Pan global Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501). Thus, so long as there is evidence to support the findings of facts by the Minister in arriving at his decision, there is no reason for a judicial review court to disturb such findings, unless there is illegality or plain irrationality. It does not matter if the review court does not come to the same decision (see: *Petroliam Nasional Berhad v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625);

(j) In the Supreme Court case of *Kennesion Brothers Sdn. Bhd. v. Construction Workers Union* [1989] 2 CLJ 569; [1989] 1 CLJ (Rep) 54; [1989] 2 MLJ 421, it was held that where a dispute arises under s. 9(1A) or s. 9(3)(c) of the Act, it may be referred to the DGIR either by the Trade Unions or by the employer or union of employers. Upon receipt of reference under s. 9(IA), DGIR may take steps to make enquiries to resolve the matter, if no resolution is made DGIR must notify the Minister for his decision under s. 9(ID), where the Minister shall decide the category of work of the workman. In this application, the Minister had done so *vide* exh. HL2;

(k) On the issue raised that the failure of the DGIR to refer to the DGTU for the DGTU to ascertain competence of either NUBE or ABOM to represent the E4 grade is an error of law, the court finds this issue has no merits;

(l) While s. 9(4B) provides that the DGIR, in exercising his functions under s. 9(1B) or under s. 9(4A) may, *inter alia*, refer to the DGTU to ascertain the competence of the trade union of workman concerned to represent any workman or class of workman, it is clear that s. 9(4B)(b) is only applicable to an application for recognition under s. 9(4A) and not s. 9(IB). In other words the reference to DGTU is only in relation to a claim for recognition and not a dispute which arises under s. 9(IA) as in the present case;

(m) As regards the issue raised that the Minister had exceeded his jurisdiction under s. 9(1D) when, without any prompting, after deciding that employees in E4 grade are not employed in the managerial, executive, confidential or security capacity, he went on to hold that the E4 grade employees fall under the scope of representation of NUBE when there was another competent trade union, ABOM, also claiming to represent these employees, the court was of the view that the said statement in the Minister's affidavit was actually in reply to the bank's affidavit in support of its application;

(n) The paragraph in the Minister's affidavit in reply complained of by the bank reads as follows:

> Bagi menjawab pengataan di perenggan 31 Afidavit Pemohon, berdasarkan keputusan yang telah dibuat oleh saya di dalam Borang E, adalah ditegaskan bahawa Eksekutif 4 (E4) adalah pekerja-pekerja yang bukan diambil kerja dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan dan berdasarkan kepada itu, Eksekutif 4 (E4) adalah jatuh di bawah skop perwakilan NUBE.

(o) It is clear that the said paragraph in the Minister's affidavit was in response to the bank's affidavit in para. 31 in which the bank had deposed as follows:

> ... even if the E4 grade employees are found to be non-executives (which is strictly denied) it does not follow that they automatically fall under NUBE's scope of representation ...

(p) Hence, the Minister's statement in relation to the E4 grade employees was in response to the statement of the bank on the same and would not affect his decision in exh. HL2;

(q) In any event, the issue of which trade union is competent to represent the E4 employees is best addressed at the appropriate time when the Minister is called upon to decide on the matter.

A **The Appeal**

[20] On 7 August 2014, we heard the oral submissions of learned counsel for the respective parties which were supplemented by their written submissions filed earlier before us.

B **[21]** Having considered the written and oral submissions of the parties and perused the appeal records, we had allowed the appeal and set aside the decision of the High Court.

[22] We take cognisance of the well settled principle that an appellate court must be slow to disturb the findings of fact of a court of first instance unless C it can be demonstrated that its findings were plainly wrong in the sense that they were made without a proper appreciation or evaluation of the totality of the evidence placed before the court or the findings were against the weight of the evidence or did not accord with the probabilities of the case taken as a whole (see: *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; D [2005] 2 MLJ 1 (FC)).

[23] Nevertheless, in this case, we are of the view that there are valid grounds for us to interfere with the decision of the High Court Judge as her findings that there was no error of law or jurisdiction or procedural impropriety on the part of the Minister in arriving at his decision dated E 21 July 2011 on the status of the E4 grade employees of the bank were plainly wrong in law. We say so for the following reasons.

[24] We are aware that this appeal is against the decision of the High Court arising from a judicial review proceeding before her.

F **[25]** As rightly pointed out by the learned High Court Judge, a judicial review court is not an appeal court. The role of a judicial review court is not to determine the correctness or otherwise of the decision of a tribunal (in this case, the Minister), but rather the decision-making process which led to the handing down of the decision by the tribunal, (the Minister in this case). A judicial review court cannot substitute the finding of a tribunal with its own G and for so long as there are evidence to support the findings of facts by the tribunal in arriving at his decision, there is no reason for a judicial review court to disturb such findings unless there is illegality or plain irrationality, and it does not matter if the review court itself may not come to the same decision, reliance being placed on the decisions in the cases of *Menara Pan* H *Global Sdn Bhd v. Arokianathan Sivapiragasam* and *Petroliam Nasional Berhad v. Nik Ramli Nik Hassan* in support of her statement of the law on judicial review.

[26] We have no quarrel with the learned High Court Judge in so far as the law relating to judicial review is concerned, but the error lies in her I application of the law to the facts of the case.

[27] In this case, the learned High Court Judge held that she was satisfied, based on the affidavits and cause papers adduced before her, that the decision of the Minister was in accordance with the law and he did not exceed his jurisdiction in any manner; that in arriving at his decision under s. 9(ID) the Minister had taken all relevant matters into consideration and had not taken any irrelevant considerations into account and he had sufficient evidence and material before him to decide.

[28] It was impressed upon us, to which we fully agree, by learned counsel for the bank that the learned High Court Judge erred in law in so finding. It was submitted that it is trite law that in order for the High Court Judge acting in her capacity as a judicial review judge to be able to come to the conclusions she did, it is imperative that she must have had all relevant materials before her for her scrutiny before she can decide whether the Minister's decision-making process was tainted or otherwise.

[29] In support of this contention, learned counsel had relied on the Federal Court's decision in *Exxon Chemical (Malaysia) Sdn. Bhd. v. Menteri Sumber Manusia Malaysia & Ors* [2007] 2 CLJ 97 which held as follows:

> Quite clearly, the Court of Appeal takes the view that the reviewing court is under a duty to conduct a meticulous examination of the facts placed before the Minister at the material time. There was much debate before us about the words "meticulous examination of the facts". In our view, there is no magic in the use of that phrase. It does not set any universal standard. It is not an inflexible term. It merely means that there should be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person, similarly circumstanced, would have arrived at the decision which the Minister had done. ... Therein, the Supreme Court took the position that our courts had since the case of '*Wednesbury Corp. (supra)*, consistently applied the basic legal principles laid down in that case as guidelines. The application of those principles would require the court to undertake an objective appraisal or examination of the facts presented to the Minister at the material time. It is therefore this context that the first question posed has to be answered'.

[30] We took note that the evidence and facts presented before the High Court in the judicial review proceedings consisted of the following:

(a) Affidavit in support dated 7 September 2011 of the bank supporting its application for an order of *certiorari*;

(b) Joint-affidavit in reply of the DGIR and the Minister dated 6 January 2012 in reply to the bank's affidavit in support of its application;

(c) Affidavit in reply of NUBE to the bank's affidavit in support dated 4 January 2012;

(d) Affidavit in reply of the bank dated 15 February 2012 in reply to the joint-affidavit of the Minister and the DGIR and the affidavit in reply of NUBE.

[31] In its affidavit-in-support of its application, substantial allegations were made against the DGIR and the Minister in the exercise of their functions and powers under s. 9 of the Act. In particular, the allegations that the Minister erred in law in failing to appreciate that the E4 grade employees were employed in the executive capacity; that the Minister erred in law when he failed to refer the matter to the DGTU under s. (4B)(b) of the Act for the DGTU to ascertain the competence of either NUBE or ABOM to represent the E4 grade staff; breach of natural justice on the part of the DGIR and or the Minister for failing to inform the bank of the outcome of the investigation and to accord the bank an opportunity to address the outcome of the investigation.

[32] Although the affidavit-in-reply of the Minister was entitled "afidavit jawapan responden pertama dan kedua", for all intents and purposes, it was the affidavit of the Minister alone. The DGIR did not file a separate affidavit to reply to the affidavit in support of the bank.

[33] In the joint-affidavit in reply, after narrating the background of the case leading to his impugned decision, the Minister stated in paras. 6, 7, 32 and 34 as follows:

6. …

(v) Setelah penyiasatan dilaksanakan untuk mengetahui skop tugas bagi kakitangan E4 tersebut, siasatan tersebut telah dimajukan kepada Responden Kedua mengenai keputusan siasatan di bawah Seksyen 9(1A) V Akta 177 berserta syor dan Responden Kedua telah kemudiannya memaklumkan keputusan siasatan di bawah Seksyen 9(1A) Akta 177 berserta syor kepada saya dan saya telah meneliti sendiri segala laporan berkaitan siasatan tersebut berserta syor di dalam membuat keputusan.

(vi) Saya sesungguhnya menegaskan bahawa saya telah membuat pertimbangan yang sewajarnya kepada semua maklumat yang dikemukakan oleh Responden Kedua di dalam laporan yang diberikan dan menegaskan bahawa saya telah memberi pertimbangan yang sewajarnya kepada semua maklumat hasil siasatan yang dikemukakan oleh Responden Kedua.

7. Selanjutnya saya sesungguhnya menyatakan bahawa setelah meneliti semua keterangan dan dokumen yang dikemukakan kepada saya dan mempertimbangkan kesemua material, saya telah pada 27.1.2011 membuat keputusan di bawah Seksyen 9(1D) Akta 177 bahawa pertikaian antara Pemohon dan Responden Ketiga adalah berkenaan kapasiti (skop tugas)

dan memutuskan bahawa Eksekutif 4 (E4) adalah pekerja-pekerja yang bukan diambil kerja dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan sepertimana telah diekshibitkan di dalam ekshibit "HL-2" Afidavit Sokongan Pemohon.

…

32. ... adalah ditegaskan bahawa, Responden Kedua telah mengambil langkah-langkah perlu dengan mengadakan siasatan serta termuduga dan seterusnya melaporkan kepada saya mengenai hasil siasatan yang telah dilakukan.

34. ... berdasarkan keputusan yang telah dibuat oleh saya di dalam Borang E, adalah ditegaskan bahawa perjawatan Eksekutif 4 (E4) adalah pekerja-pekerja yang bukan diambil kerja dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan dan berdasarkan kepada itu, Eksekutif 4 (E4) adalah jatuh di bawah skop perwakilan NUBE.

[34] However, the report of the DGIR was never exhibited in the joint-affidavit in reply.

[35] In its affidavit-in-reply to the joint-affidavit of the DGIR and the Minister and NUBE, the bank, *inter alia*, in paras. 37 and 42 of its affidavit in reply had affirmed through its deponent as follows:

37. Untuk membalas perenggan 5.1, 5.3,6,8,12 dan 16 Afidavit Responden Ketiga, saya dinasihatkan oleh Peguamcara Pemohon dan sesungguhnya percaya bahawa penegasan di dalamnya hanyalah penegasan kosong dan tidak disokong oleh sebarang keterangan berdokumen dan tidak harus dipertimbangkan.

…

40. Untuk membalas perenggan 39 dan 40 Afidavit Responden-responden Pertama dan Kedua, saya dinasihatkan oleh Peguam cara Pemohon dan sesungguhnya percaya bahawa akibat daripada kegagalan Responden Pertama untuk memaklumkan Pemohon tentang keputusan penyiasatan dan sesi wawancara yang dijalankan oleh Jabatan Perhubungan Perusahaan, Pemohon dirampas peluang untuk menangani keputusan tersebut dan memberikan penjelasan yang perlu berhubungan dengan sifat kerja kakitangan Eksekutif E4 yang tepat dan menyeluruh. Dalam hal ini, saya mengulang perenggan 40 Afidavit Pemohon.

41. Saya dinasihatkan oleh Peguam pemohon dan sesungguhnya percaya bahawa dalam ketiadaan sebarang dokumen berhubung dengan keputusan penyiasatan dan sesi wawancara yang dijalankan oleh Jabatan Perhubungan Perusahaan, inferens oleh itu dibuat bahawa tidak ada sebarang asas untuk mencapai kesimpulan bahawa Eksekutif E4 tidak digaji dalam kapasiti eksekutif.

[36] We fully agree with learned counsel for the bank that once the decision-making process of the Minister was challenged in a judicial review application, it was incumbent on the Minister to justify the manner by which he came to his decision by exhibiting the relevant reports and documents furnished to him by the DGIR. It was not sufficient for the Minister to make an averment that he had relied on the investigation of the DGIR. In the absence of the reports and documents, the statement of the Minister that he took into account the report of the DGIR was a bare averment.

[37] The learned High Court Judge in her judgment had found that based on the materials before her, she was satisfied that there were sufficient facts placed before the Minister to enable him to come to the decision he did.

[38] We agree with the submission of learned counsel for the bank that the High Court Judge could not have come to such a conclusion when she did not have before her the report of the DGIR to enable her to objectively determine whether the Minister's decision-making was flawed or otherwise.

[39] In consequence, we are of the view that the learned High Court Judge erred in failing to consider that the absence of the report of the DGIR referred to by the Minister in his joint-affidavit in reply had resulted in her inability to meticulously examine all the materials that were said to have been before the Minister when he made his impugned decision.

[40] We further agree with the bank's learned counsel that the High Court Judge erred when she held that the DGIR had deposed that he had conducted and interviewed the relevant employees to determine the scope of work of the Executive E4 grade Staff in coming up with his recommendation to the Minister; and that the DGIR was not mandated by law to inform the bank of this.

[41] The facts before the High Court showed that the DGIR did not affirm a separate affidavit exhibiting his report based on his investigation which he had carried out which was then submitted to the Minister.

[42] Consequently, there was no material before the High Court to enable it to confirm that the Minister had acted reasonably in coming to his decision.

[43] We agree that the failure of the Minister to enclose the DGIR's report which he had relied on and/or the failure of the DGIR to depose a separate affidavit enclosing his report tantamount to a fatal error justifying an order of *certiorari*.

[44] We agree with the submission of learned counsel for the bank that in failing to take into account the obligation on the part of the Minister and/or DGIR to produce the report upon which the decision was founded on, the High Court similarly committed an error of law.

[45] For the above reasons, we allowed the appeal and set aside the decision of the High Court. We grant order in terms of prayers (a) and (c) in the bank's application dated 8 September 2011 with costs fixed at RM10,000 here and below and deposit was ordered to be refunded.